

INTERNET COPYRIGHT:

Issues and Myths

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Case law related to Internet copyright is not yet well developed, so many issues related to the use of content from the 'net do not have bright-line, clear answers. Courts in different jurisdictions have delivered a variety of – sometimes conflicting – opinions.

Common Internet Copyright Issues:

Linking – Permission to add a hypertext link for an external Web site to your site is not legally necessary. Linking to a Web site containing infringing material might comprise “contributory infringement” (*Intellectual Reserve v. Utah Lighthouse Ministry*, 1999). In *Ticketmaster v. Tickets.com* (2000), the court ruled that “...hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. The customer is automatically transferred to the particular, genuine Web page of the original author. There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently.” **Deep linking** – the practice of linking to a page deep within another Web site – has created a greater controversy because material might be delivered in a way other than as intended by the copyright owner, such as bypassing advertising pages or allowing access to pages intended to be viewed exclusively by subscribers to a commercial service. *Ticketmaster v. Microsoft*, a deep linking case, was settled out of court in 1999. Deep linking directly to another Web sites' content has increasingly come under legal fire in Europe and under European Union law.

“Inlining” or “In-line Linking” – Instructing the user’s browser, through HTML code, to retrieve a graphic from a source Web site for display within a page of an unrelated site – was initially found by the Ninth Circuit Court of Appeals to be an infringement in *Kelly v. Arriba* (2002), but a later revised opinion (2003) withdrew that ruling. The legal status of inlining images without permission continues to be somewhat unsettled.

Framing – The practice of displaying multiple Web pages within a single Internet browser window – may imply an association between the true provider of the content and the “framer,” a potential trademark infringement. Framing also arguably creates a “derivative work,” a potential copyright infringement. The *Washington Post v. TotalNews* case (1997) was settled out of court and involved a commercial site which framed various news sites, surrounded by the TotalNews logo and banner advertisements. Many of the legal issues that were raised in the TotalNews case are still unsettled and therefore legal guidelines as they relate to framing have not as yet been established.

“Shareware” and **“Freeware”** are not the same as public domain. With both, the intellectual property owner retains the copyright. In the case of shareware, the copyright owner licenses the use of his/her property for a minimal fee, often after the user has had the opportunity to try out the product (software). With Freeware, the owner licenses the property at no charge, but may impose other restrictions on use under the license.

“Royalty Free” is not the same as **“Copyright Free.”** The latter term is roughly synonymous with public domain; however, “Royalty Free” – sometimes used in the context of production music, images, and clip art – means that the owner licenses the property at no charge, but may impose other restrictions on use under the license.

Ten Common Copyright Myths:

1. *“I’m free to use any work that does not have a copyright notice on it, because it’s not copyrighted.”*

Intellectual property is protected under current U.S. and international copyright law from the moment it is fixed in a tangible medium. A work no longer requires any formal notice to enjoy copyright protection.

2. *“If it’s on the Internet, it’s public domain.”*

All intellectual property – including Web pages, e-mail messages, Listserv messages, blogs, and Usenet postings – are legally protected by copyright law from the moment of creation. Such material should only be used with permission or under the provisions of “fair use.”

3. *“I’m only using a small amount of the copyrighted work.”*

Although the proportion of material used in relation to the work as a whole is one factor in determining fair use, all elements of the statutory definition must be considered in combination. Even the use of a small quantity of material might be an infringement, depending on the confluence of the other factors.

4. *“It’s okay to use the material if I give credit.”*

Unlike the ethical issue of plagiarism, copyright infringement is a legal matter. Even credited use of someone else’s intellectual property, without permission, is a copyright infringement unless the use is “fair,” as defined by the statute.

5. *“It’s okay to use the material as long as I’m not charging anyone else to use it.”*

The purpose of the use – commercial versus noncommercial – is just one factor in determining fair use. Even if you do not charge for the material, by making it available you might be negatively impacting the commercial value of the copyright owner’s property. Indeed, the courts often weigh the effect of the use upon the potential market for the work more heavily than the other elements of fair use.

6. *“Because I work for the university, whatever I use is ‘fair use’ because it’s educational.”*

Even educational use can be disqualified from “fair use” – just as a commercial use can be “fair.” Again, all elements of the statutory definition must be considered in combination.

7. *“If I mail myself a copy of my work, it’s the same as registering it with the Copyright Office.”*

The so-called “poor man’s copyright” has no real validity. Before an owner of a U.S. copyright can sue for infringement, the work must be formally registered. Mailing yourself a copy of your work does little else other than establishing when the envelope was sent and likely will have scant impact in a court of law.

8. *“If I adapt the work I don’t need permission.”*

The statute gives the copyright owner the exclusive right to make or authorize derivative works. No matter how much you change the original, the owner still retains his/her copyright; however, an authorized derivative work can be additionally copyrighted as a separate work.

9. *“The author is dead.” “The book is out of print.”*

The copyright survives the author and might be owned by heirs. An out-of-print book still has a potential market, one factor considered in determining “fair use.” “Out of print” does not mean “out of copyright.”

10. *“I bought the book/CD, so I can use it any way I want.”*

The purchaser owns only that copy of the work. Owning a copy of a work does not include the separate right to display or perform that material in a public forum such as the Internet.